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SHOP-VAC CORPORATION

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RICHARD A. SILBER, an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

SHOP-VAC CORPORATION, a
Pennsylvania Corporation, and DOES 1
through 100, inclusive

Defendants.

CASE NO. 3:08CV00637-JLS (RBB)

**NOTICE OF MOTION AND MOTION TO
STRIKE IMMATERIAL AND
IMPERTINENT STATEMENTS FROM
COMPLAINT (FRCP RULE 12 (F))**

DATE: July 18, 2008

TIME: 10:30 AM

COURTROOM: 6

Hon. Janis L. Sammartino

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON Friday, July 18, 2008, or as soon thereafter as the matter may be heard in Courtroom 6 of the above-entitled Court, located at 940 Front Street, San Diego, California, Defendant SHOP-VAC CORPORATION will move the Court pursuant to Rule 12(f), Fed. R. Civ. Pro. to strike portions of Plaintiff's Complaint on the grounds that such statements are immaterial and/or impertinent and have no essential or important relationship to the claims for relief or they do not pertain and are not necessary to the issues in question. Specifically, Shop-Vac moves to strike the following:

- 1 • Item 1 of Plaintiff's prayer seeking damages (p. 14:12-13): "Damages according to
2 proof as to the third cause of action. (See *Colgan v. Leatherman Tool Group, Inc.* (sic) Cal.App.4th
3 663, 696 (2nd Dist. 2006));"
- 4 • Reference to receipt and recovery of "ill-gotten gains" as described in ¶ 45 of the
5 Complaint and Item 5 of Plaintiff's Prayer. Specifically, Shop-Vac moves to strike: "by the receipt
6 of ill-gotten gains" (p.12: 18-19); "of the ill-gotten gains as set forth in the analysis contained in the
7 seminal case of *Colgan v. Leatherman Tool Group, Inc.* (2006) (sic) Cal.App.4th 663 and" (p. 12:20-
8 22); and "with all ill-gotten monies acquired by means of Defendant's unfair competition, which is
9 measured by the analysis contained in the seminal case of *Colgan v. Leatherman Tool Group, Inc.*
10 (2006) (sic) Cal.App.4th 663" (p.14: 23-26).

11 This Motion is submitted simultaneously and in the alternative with Defendant's Motion to
12 Strike pursuant to Rule 12 (b)(6), Fed. R. Civ. Proc. This Motion is based on this Notice of Motion
13 and Motion, the Memorandum of Points and Authorities filed herewith, the pleadings on file with the
14 Court, and such argument as may be presented at the hearing on the Motion.

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16 Dated: April 29, 2008

ARMSTRONG TEASDALE LLP

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18 By: /s/ Susan D. Condon

19 Attorney for Defendant SHOP-VAC
20 CORPORATION

21 Email: scondon@armstrongteasdale.com
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically this **29th day of April, 2008** with the Clerk of the USDC Southern District of California (San Diego) to be served by operation of the Court's ECF electronic filing system upon the following:

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